

05-657 NOV 22 2005

No. _____

~~OFFICE OF THE CLERK~~

IN THE

Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

ANDREW L. SCHLAFLY *
939 Old Chester Road
Far Hills, NJ 07931
(908) 719-8608

* Counsel of Record

Counsel for Petitioners

QUESTIONS PRESENTED

1. Do defendants bear the burden of proving they “would” have been acquitted, rather than “could” have been acquitted, in order to obtain a new trial for convictions procured with perjury, an issue as to which the Courts of Appeals are in conflict?

2. When convictions rely on charges later dismissed by the court due to perjury by a key government witness, may the court deny defendants their right to a new trial by jury based on its own factual findings, in light of *United States v. Booker*, 125 S. Ct. 738 (2005), and *Washington v. Recuenco*, cert. granted, 126 S. Ct. 478 (2005)?



TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION.....	7
I. THE CIRCUITS ARE EXPRESSLY DIVIDED OVER THE STANDARD FOR A NEW TRIAL BASED ON PERJURY BY A GOVERNMENT WITNESS	8
A. The Decision Below Squarely Presents the Conflict by Expressly Disagreeing with the Fourth and Sixth Circuits, and also Con- flicting with Many Other Circuits in the Scope of the Permissive Standard	9
B. The Seventh Circuit Test Conflicts with Rulings of This Court	13
C. There is Heightened Urgency to Deter Perjury in Criminal Trials in Light of the Increasingly Permissive and Conflicting Standards	16
II. THE COURT BELOW DEPRIVED DE- FENDANTS OF THEIR RIGHT TO TRIAL BY JURY, AS CLARIFIED BY <i>UNITED</i> <i>STATES V. BOOKER</i> , BY AFFIRMING CONVICTIONS DESPITE DISMISSAL OF UNDERLYING CHARGES.....	19

TABLE OF CONTENTS—Continued

	Page
A. The Decision Below Deprived Defendants of Their Right to Trial by Jury by Sub- stituting the Court's Factfinding for the Jury's	20
B. This Court Should Resolve the Ambiguity and Conflict Concerning Application of <i>Booker</i> to Tainted Verdicts.....	22
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Pages
<i>Banks v. Dretke</i> , 124 S. Ct. 1256 (2004).....	9, 12, 13
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	22
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	20
<i>Communist Party of the United States v. Sub- versive Activities Control Bd.</i> , 351 U.S. 115 (1956).....	15
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963).....	14
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	16
<i>Gordon v. United States</i> , 178 F.2d 896 (6th Cir. 1949), <i>cert. denied</i> , 339 U.S. 935 (1950).....	10, 11
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	13, 14, 15 16
<i>Larrison v. United States</i> , 24 F.2d 82 (7th Cir. 1928).....	<i>passim</i>
<i>Mesarosh v. United States</i> , 352 U.S. 1 (1956)	7, 14, 15
<i>In re Michael</i> , 326 U.S. 224 (1945).....	7
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935).....	16
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	8, 18
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972)	21
<i>Sheen v. Illinois Dep't of Public Aid</i> , Case No. 86-MR-30 (Ill. 10th Cir. Dec. 4, 1987)	6
<i>United States v. Agurs</i> , 427 U.S. 97 (1976).....	15, 20
<i>United States v. Booker</i> , 125 S. Ct. 738 (2005).....	<i>passim</i>
<i>United States v. Chisum</i> , 436 F.2d 645 (9th Cir. 1971).....	11
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	20
<i>United States v. Gonzales-Gonzales</i> , 258 F.3d 16 (1st Cir. 2001).....	17
<i>United States v. Gullett</i> , 62 Fed. Appx. 554 (4th Cir.), <i>cert. denied</i> , 124 S. Ct. 498 (2003)	17
<i>United States v. Huddleston</i> , 194 F.3d 214 (1st Cir. 1999).....	17
<i>United States v. Josleyn</i> , 206 F.3d 144 (1st Cir. 2000).....	17

TABLE OF AUTHORITIES—Continued

	Pages
<i>United States v. King</i> , 71 Fed. Appx. 192 (4th Cir. 2003).....	17
<i>United States v. Krasny</i> , 607 F.2d 840 (9th Cir. 1979), <i>cert. denied</i> , 445 U.S. 942 (1980)	11
<i>United States v. Lofton</i> , 233 F.3d 313 (4th Cir. 2000).....	10
<i>United States v. Maynard</i> , 77 Fed. Appx. 183 (4th Cir. 2003)	17
<i>United States v. McGrady</i> , 1999 U.S. App. LEXIS 2395 (4th Cir.), <i>cert. denied</i> , 528 U.S. 855 (1999).....	17
<i>United States v. Nixon</i> , 881 F.2d 1305 (5th Cir. 1989).....	18
<i>United States v. Peterson</i> , 223 F.3d 756 (8th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1175 (2001)	11
<i>United States v. Roberts</i> , 262 F.3d 286 (4th Cir. 2001), <i>cert. denied</i> , 535 U.S. 991 (2002)	17
<i>United States v. Rohira</i> , 355 F. Supp. 2d 894 (N.D. Oh. 2005).....	22
<i>United States v. Sawyer</i> , 85 F.3d 713 (1st Cir. 1996).....	21
<i>United States v. Stofsky</i> , 527 F.2d 237 (2d Cir. 1975), <i>cert. denied</i> , 429 U.S. 819 (1976)	13
<i>United States v. Wallace</i> , 528 F.2d 863 (4th Cir. 1976).....	10
<i>United States v. Williams</i> , 233 F.3d 592 (D.C. Cir. 2000).....	13
<i>United States v. Willis</i> , 257 F.3d 636 (6th Cir. 2001).....	10
<i>Washington v. Hughes</i> , 154 Wn.2d 118 (2005).....	22
<i>Washington v. Recuenco</i> , 110 P.3d 188, <i>cert. granted</i> , 126 S. Ct. 478 (2005)	i, 22
<i>Weeks v. United States</i> , 232 U.S. 383 (1914).....	18

TABLE OF AUTHORITIES—Continued

Pages

<i>Williams v. United States</i> , 500 F.2d 105 (9th Cir. 1974).....	21
<i>Yates v. State</i> , 171 S.W.3d 215 (Ct. App. Tex., 1st Dist. 2005), <i>appeal denied</i> , 2005 Tex. Crim. App. LEXIS 1926 (Tex. Crim. App., Nov. 9, 2005).....	17

Constitution, Statutes and Regulatory Materials

U.S. CONST., AMEND. VI	2
------------------------------	---

Articles

Brian Murray and Joseph C. Rosa, "He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 <i>N.E. J. on Crim. & Civ. Con.</i> 1 (Winter 2001)	18
Lisa Stein, "The Big Lie(s)," <i>U.S. News & World Report</i> 18 (May 31, 2004)	16-17

IN THE
Supreme Court of the United States

No. ____

ROBERT T. MITRIONE AND MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

Robert T. Mitrione and Marla A. DeVore respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment below.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 13a-29a) is reported at 357 F.3d 712. The opinion of the district court (App. 52a-61a), which vacated most but not all convictions, is unreported. The opinion of the district court (*id.* at 30a-34a), which denied a motion for partial dismissal of the indictment, is reported at 160 F. Supp. 2d 993.

This Court granted, on sentencing grounds, defendants' prior petition for a writ of certiorari. This Court vacated the

judgment and “remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Booker*,” in a decision reported at 125 S. Ct. 984 (2005) (App. 12a). On remand, the court of appeals issued an unreported opinion that remanded to the district court to “tell us whether the additional discretion afforded by *Booker* would affect the defendants’ sentences” (App. 10a-11a) (citing *United States v. Booker*, 125 S. Ct. 738 (2005)). The trial judge then issued an unreported opinion holding that she would have imposed the same sentences on defendants under *Booker* (App. 2a-9a). On August 26, 2005, the court of appeals affirmed in an unreported decision (*id.* at 1a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 26, 2005 (App. 1a). This timely petition for a writ of certiorari was subsequently filed by November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST., AMEND. VI.

STATEMENT OF THE CASE

Petitioners Robert Mitrione, M.D., and Marla DeVore were convicted for mail fraud concerning a mere \$25 claim and for false claims entailing only \$50.25, for a grand total of only \$75.25. On this meager jury-determined amount defendants were sentenced to 23 and 15 months, respectively, in prison. Petitioner Mitrione’s office had submitted the \$75.25

in charges to the Medicaid program; his wife Marla DeVore worked in the office.

The primary defense was lack of intent to defraud. To prove criminal intent, the prosecution relied on the testimony of a member of the prosecutorial team, Ms. Deanna Statler. Yet her testimony was a complete lie, as found later by the court:

Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital **was false to a dramatic degree.**

App., *infra*, 55a (emphasis added).

Specifically, the prosecutor proved criminal intent by claiming that a remarkable 28% of defendants' invoices were for undocumented services, and that such percentage was far higher rate than the amount of missing bills for services rendered (9%). App., *infra*, 63a. Included in Ms. Statler's false testimony was her claim that she would have allowed only 14% of defendants' bills (Statler Tr. at 2311). Ms. Statler's false testimony was designed to disprove carelessness as the cause of the poor documentation, and to prove intent to defraud the government. The prosecutor emphasized this in his closing argument to the jury:

Deanne [sic] Statler, you heard from her regarding the percentage, the fact that three times more bills were sent out when no service was provided than otherwise.

Court of Appeals (C.A.) App. 193.

The prosecution drove the point home further with the jurors:

The Public aid auditor [Ms. Statler] says she looked through hundreds of records and no treatment notes [and the] benefits paid, 28 percent. No treatment notes, 9 percent. Those are the numbers that should matter . . .

If you look at all the records as this Public aid auditor [Ms. Statler] did, and you come up with three times more billed than not billed, accident? Be kind of weighted a little more evenly if it were an accident, wouldn't it?

C.A. Record Doc. 279, p. 2716; *see also* App., *infra*, 57a. This was the prosecution's primary evidence of fraudulent intent, and the jury returned convictions against defendants on most charges on September 13, 2001.

The prosecutor, Assistant U.S. Attorney (AUSA) Patrick Hansen, personally prepared the false trial exhibit 20B that graphically illustrated defendants' alleged fraud. App., *infra*, 63a. In the post-trial hearing, Ms. Statler confirmed the integral role played by the prosecution in connection with the false testimony:

Q. [D]id Mr. Hansen then prepare Exhibit 20B?

A. Yes, he did.

Q. And prior to the time that you testified . . . you talked to Mr. Hansen about his preparation of Exhibit 20B, correct?

...

A. Yes, he showed it to me.

C.A. App. 95. Ms. Statler further confirmed that prosecutor Hansen "had done the chart on his computer." *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 55a-57a.

Ms. Statler's post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with the AUSA Hansen. C.A. App. 15 ("I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators."). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly